A

SRIDHAR ARUNASALAM

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
ABDUL WAHAB PATAIL J
[CRIMINAL APPEAL NO: W-06A-2-2005]

C

22 JULY 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 200.2 grammes dangerous drugs - Trial judge found appellant had exclusive custody and control and so had knowledge -*

D

Whether actual possession proved on facts - Whether actual knowledge proved - Whether s. 37(da)(iiia) presumption inapplicable

The appellant appealed against his conviction and death sentence for trafficking in 200.2 grammes dangerous drugs under

E

s. 39B(1)(a) Dangerous Drugs Act 1952 ('DDA') punishable under s. 39B(2) of the same. The facts showed that the appellant was arrested following a police ambush led by a police officer SP4 who had acted on information received that a drug trafficking transaction was to take place at a McDonald's restaurant in Jalan

F

Pahang Kuala Lumpur. The appellant was caught carrying a red bag slung over his shoulders that he did not attempt to throw away. Inside the red bag was a green bag and inside the green bag was a box containing six Chinese newspaper packages. Inside each of the package was a clear plastic package containing

G

powdery substance that was later confirmed by the chemist to be a mixture of heroin and monoacetylmorphines, a total of 200.2 grammes dangerous drugs. The trial judge found that the prosecution had proved that the appellant had exclusive custody and control of the drugs and that he had knowledge of the drugs.

H

Held (allowing the appeal)
Per KN Segara JCA delivering judgment of the court:

(1) Any "transaction" must involve the participation of more than one person. It was in that context and the alleged information

I

received by SP4 that the charge against the appellant must be viewed to determine the culpability of the appellant for an offence that carried the mandatory death penalty. Further, an

accused must be accorded the benefit of any inference favourable to him from a given set of facts. That must be strictly adhered to and the prosecution could not shirk its responsibility to prove its case beyond reasonable doubt by invoking any adverse inferences from the said facts to establish any ingredient of the offence. (para 3)

(2) There was no doubt that the appellant had custody and control of the red bag slung over his shoulder at the time of his arrest. However, there was no evidence that the appellant had knowledge of the drugs in each of the six plastic packets wrapped in Chinese newspaper found inside the box in the green bag discovered inside the red bag. The contents of the box were not visible without X-ray vision. The trial judge erred and misdirected himself at the close of the prosecution's case in finding that the appellant had actual knowledge of the drugs found in the box. (paras 9 & 10)

(3) The trial judge failed to consider the cautioned statement of the appellant introduced in the course of the prosecution's case. No investigations were carried out by the investigating officer to ascertain the existence of one Magen and one Jimi referred to in the cautioned statement. The cautioned statement was made about 17 hours after the appellant's arrest. In his cautioned statement, the appellant had stated that he had been paid to deliver a box containing handphones but that he did not see what was inside the box. In his cautioned statement, he had also stated that the person who had asked him to deliver the box was Magen and that he had obtained the box from Jimi. If the cautioned statement had been adequately considered, no reasonable person would have concluded that the appellant had actual knowledge of the drugs inside the box. (paras 11 & 12)

(4) An appearance of being frightened and panicky or an act of attempting to run away upon being suddenly pounced on by uniformed persons was no measure of guilt of an accused or that he had knowledge of the drugs. Such conduct was equivocal. It must be considered in the totality of the evidence. The cautioned statement was brief but illuminating as to the appellant's actual knowledge, if any, of the drugs found at the time of his arrest. He had given an explanation in the statement as to why he was frightened and why he

struggled when the police suddenly pounced on him and handcuffed him. He believed that he had brought smuggled handphones. (paras 13 & 14)

(5) The prosecution invoked the presumption under s. 37(da)(iiia) DDA to establish trafficking as the quantity of the drugs was 200.2 grams. There was no evidence of any actual trafficking by the appellant. There was no drug transaction by the accused at the restaurant. In the circumstances, in order to invoke the presumption of trafficking, the prosecution must establish actual possession. (paras 16 & 17)

(6) The prosecution failed to adduce sufficient evidence of actual possession of the drugs. There was no evidence he had actual knowledge. Therefore, the presumption of trafficking under s. 37(da)(iiia) could not be invoked. However, as there was *prima facie* evidence that the appellant had custody and control of the red bag and consequently of all the contents therein, he shall be deemed to have been in possession of the drugs and shall be deemed to have known the nature of such drug until the contrary was proved upon invoking the aid of s. 37(d) DDA. (para 18)

[Conviction and sentence under s. 39B DDA set aside; conviction under s. 12(2) DDA punishable under s. 39A(2) of the same. As the amount of the drug was substantial, the appellant was sentenced to 17 years' imprisonment from the date of arrest and 10 strokes of rotan.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu merayu terhadap sabitan dan hukuman mati yang dikenakan terhadapnya kerana mengedar dadah berbahaya sebanyak 200.2 grams di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('DDA') yang boleh dihukum di bawah s. 39B(2) Akta yang sama. Fakta menunjukkan bahawa perayu ditangkap berikutan serangan hendap polis yang diketuai oleh seorang pegawai polis SP4 yang telah bertindak atas maklumat yang diterimanya bahawa suatu transaksi pengedaran dadah akan berlaku di restoran McDonald's di Jalan Pahang Kuala Lumpur. Perayu ditangkap membawa sebuah beg merah tergantung atas bahunya yang dia tidak cuba untuk buangkan. Dalam beg merah itu terdapat sebuah beg hijau dan dalam beg hijau itu pula ada sebuah kotak yang mempunyai enam bungkusan dalam liputan suratkhabar Cina. Dalam setiap bungkusan itu terdapat sebuah

plastik jelas yang berisi bahan serbuk yang kemudiannya disahkan oleh ahli kimia sebagai campuran heroin dan monoacetylmorphines sejumlah 200.2 gram dadah berbahaya. Hakim bicara mendapati bahawa pihak pendakwaan telah membuktikan perayu mempunyai jagaan dan kawalan eksklusif dadah tersebut dan ada pengetahuan mengenainya.

Diputuskan (membenarkan rayuan)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Mana-mana transaksi mesti melibatkan penyertaan lebih daripada satu orang. Ianya dalam konteks itulah dan maklumat pengataan yang diterima SP4 di mana tuduhan terhadap perayu mesti dipertimbangkan untuk memutuskan kebersalahan perayu untuk satu kesalahan yang membawa penalti mati mandatori. Lebih lagi, seorang tertuduh mesti diberikan faedah mana-mana inferens yang menguntungkannya berdasarkan fakta yang ada. Ianya mesti dipatuhi dengan tegas dan pihak pendakwaan tidak boleh mengabaikan tanggungjawabnya untuk membuktikan kes melebihi kes keraguan munasabah dengan membangkitkan mana-mana inferens yang menentang daripada fakta tersebut untuk membuktikan mana-mana ingredien kesalahan itu.

(2) Ianya tidak diragui bahawa perayu mempunyai jagaan dan kawalan beg merah yang tergantung atas bahunya pada masa perayu ditangkap. Tetapi tiada keterangan bahawa perayu ada pengetahuan mengenai dadah tersebut di dalam setiap enam bungkusan suratkhabar Cina itu yang didapati di dalam kotak di dalam beg hijau yang dijumpai pula di dalam beg merah. Kandungan kotak dengan enam bungkusan tersebut tidak boleh dilihat hanya jika menggunakan X-ray. Hakim bicara terkhilaf dan tersalah arah pada akhir kes pendakwaan dengan mendapati perayu ada pengetahuan benar mengenai dadah yang dijumpai di dalam kotak itu.

(3) Hakim bicara gagal menimbangkan pernyataan beramaran perayu yang dikemukakan dalam perjalanan kes pendakwaan. Tiada penyiasatan yang dijalankan pegawai penyiasat untuk menentukan kewujudan seorang Magen dan seorang Jimi yang dirujuk di dalam pernyataan itu. Pernyataan itu di buat 17 jam selepas perayu ditangkap. Dalam pernyataan itu, perayu

menyatakan bahawa dia dibayar untuk menghantar kotak yang mengandungi telefon bimbit tetapi dia tidak tengok apa yang ada di dalam kotak itu. Orang yang menyuruh menghantarkannya ialah Magen dan dia memperolehi kotak tersebut daripada Jimi. Jika pernyataan beramaran dipertimbangkan secukupnya, tiada orang munasabah yang akan menyimpulkan bahawa perayu mempunyai pengetahuan benar mengenai dadah dalam kotak itu.

(4) Wajah berkelihatan takut dan cemas atau tindakan cuba melarikan diri apabila ditahan oleh orang beruniform tidak boleh dianggap membuktikan kesalahan tertuduh atau bahawa dia ada pengetahuan mengenai dadah. Ianya mesti dipertimbangkan berdasarkan keseluruhan keterangan. Pernyataan beramaran adalah ringkas tetapi jelas mengenai pengetahuan benar perayu, jika ada, mengenai dadah yang dijumpai pada masa tangkapannya. Dia telah memberi penjelasan di dalam kenyataannya kenapa dia berasa takut dan kenapa dia bergelut apabila polis tiba-tiba mencengkam dan menggarinya. Dia percayai bahawa dia telah membawa telefon bimbit yang diseludup.

(5) Pihak pendakwaan menggunakan anggapan di bawah s. 37(da)(iiia) DDA untuk membuktikan pengedaran kerana kuantiti dadah ialah 200.2 grams. Tidak ada keterangan bahawa terdapat pengedaran sebenar oleh perayu. Tiada transaksi dadah oleh perayu di restoran tersebut. Dalam keadaan demikian, pihak pendakwaan mesti membuktikan milikan sebenar untuk membangkitkan anggapan pengedaran.

(6) Pihak pendakwaan gagal mengemukakan keterangan mencukupi milikan sebenar dadah tersebut. Tidak ada keterangan yang perayu ada pengetahuan sebenar. Dengan itu, anggapan pengedaran di bawah s. 37(da)(iiia) tidak boleh digunakan. Namun begitu, kerana terdapat keterangan *prima facie* bahawa perayu ada jagaan dan kawalan beg merah dan seterusnya semua kandungannya, dia dianggap mempunyai milikan dadah berkenaan dan dianggap mengetahui jenis dadah tersebut sehingga sebaliknya dibuktikan dengan bantuan s. 37(d) DDA.

[Sabitan dan hukuman di bawah s. 39B DDA diketepikan; sabitan di bawah s. 12(2) DDA dihukum di bawah s. 39A(2) Akta yang sama. Disebabkan jumlah dadah agak banyak, maka perayu dihukum 17 tahun penjara dari tarikh tangkapan dan 10 sebatan rotan.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(d), 37(da)(iiia), 39A(2) 39B(1)(a), 39B(2)

For the appellant - Gurbachan Singh Bagawan Singh; M/s Bachan & Kartar
For the respondent - Saiful Edris Hj Zainuddin DPP; A-G's Chambers

[Appeal from High Court, Criminal Trial No: 46-22-2004]

Reported by Usha Thiagarajah

JUDGMENT

KN Segara JCA:

[1] The appellant was charged and convicted for the offence of trafficking in 200.2 grammes of dangerous drugs (120.8 grammes heroin and 79.4 grammes monoacetylmorphines) on 22 September 2003, an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (Act) and punishable under s. 39B(2) of the Act. He was sentenced to death at the High Court, Kuala Lumpur on 25 February 2005. This appeal is against the conviction and the mandatory death sentence.

Briefly, The Facts Are As Follows

[2] On 22 September 2003, upon information received, C/I Roslan bin Hussin (SP4) led a team of 12 police officers in mufti at about 6.45pm to make observation and execute an ambush at the McDonald's Restaurant, Jalan Pahang, Kuala Lumpur because a drug trafficking transaction was to take place. SP4 stated in cross-examination:

> Punca operasi ini ialah satu maklumat dadah yang diterima oleh saya,iaitu seorang lelaki India akan menjalankan transaksi pengedaran dadah di kawasan McDonalds Titiwangsa. Saya tidak pasti transaksi itu diantara siapa. Pemberi maklumat itu tidak terlibat dalam transaksi itu. (emphasis provided)

[3] At the very outset we observe and emphasize that any "transaction" must involve the participation of more than one person. It is in this context and the alleged information received by C/I Roslan that the charge against the appellant must be viewed, to determine the culpability of the appellant for an offence

A that carries the mandatory death penalty. Further, the well-settled principles in criminal law that an accused must be accorded the benefit of any inference favorable to him from a given set of facts must be strictly adhered to and the prosecution cannot shirk its responsibility to prove its case beyond a reasonable doubt by
B invoking any adverse inferences from the said facts, to establish any ingredient of the offence.

[4] We shall continue to proceed with the salient facts of the prosecution's case against the appellant. On arrival at the
C restaurant at about 6.45pm C/I Roslan split his team into three groups. The 1st group, headed by C/I Roslan, positioned themselves at the 1st floor of the restaurant, the 2nd group at the ground floor whilst the 3rd group was positioned outside of the restaurant. There were no customers on the 1st floor.

D

[5] At about 7.15pm C/I Roslan saw a male Indian, wearing a blue helmet and carrying a red bag slung on his shoulders, enter the restaurant on foot and proceeded straight to the 1st floor. C/I Roslan and his team dashed towards him and identified
E themselves as police. He was pounced upon and the police allege he attempted to run away. A struggle ensued and then he was arrested. The red bag was still with him. The police asserted that he had not at any time thrown it away. He was not told why he was arrested. The male Indian was identified as the appellant.

F **[6]** C/I Roslan examined the red bag on the 1st floor of the restaurant in the presence of the appellant. He appeared frightened and panicky. C/I Roslan testified:

S: Apa reaksinya semasa pemeriksaan itu?

G

J: Dia kelihatan takut

[7] Inside the red bag (P9) was a green bag. Inside the green bag (P10) was a box (P11) with the brand name "Nike". Inside the box were six Chinese newspaper packages and inside each of
H the packages was a clear plastic package containing powdery substance suspected to be heroin. The powdery substance was analyzed by the chemist and was confirmed to be dangerous drugs weighing 200.2 grams – a mixture of heroin and monoacetylmorphines, as set out in the charge.

I

[8] At the close of the case for the prosecution the learned trial judge came to the conclusion that the prosecution had proved that the appellant had exclusive custody and control of the drugs and that he had knowledge of the said drugs. The learned judge did not invoke the presumption under s. 37(d) of the Act to establish the appellant had possession of the drugs. Section 37(d) reads:

> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

[9] There is no doubt that the appellant had custody and control of the red bag slung over his shoulder at the time of his arrest. However, there was no unequivocal evidence that the appellant had knowledge of the drugs in each of the six plastic packets wrapped in Chinese newspaper found inside the box in the green bag discovered inside the red bag. There was no evidence as to who had packed the six packages inside the box. There was no evidence outside or inside the box to link it in any way with the appellant. There was no evidence as to who had placed the box inside the green bag. There was no evidence as to who had placed the green bag with its contents into the red bag. It is indisputable that the contents of the box are not visible without X-ray vision to any mortal handling or examining the unopened box, before placing it into the green bag. A *fortiori* the contents of the box with its six packages are not visible through the red bag! The fact the green bag had the abbreviation "ATM" coupled with the fact the appellant was a member of the armed forces and worked as a store keeper where similar bags are found cannot by any stretch of imagination establish or indicate that the appellant had knowledge of the drugs found in the box.

[10] We are unanimous that the trial judge had seriously erred and misdirected himself at the close of the prosecution's case in finding that the appellant had actual knowledge of the drugs found in the box upon his arrest.

[11] We are unanimous that the learned trial judge failed to consider adequately exh. D3, the caution statement of the appellant, introduced in the course of the prosecution's case and upon which caution statement no investigations were carried out

by the investigating officer to ascertain the existence of Magen and Jimi referred to therein. The caution statement was made about 17 hours after the appellant's arrest. In his caution statement the appellant had stated that he had been paid to deliver a box containing hand phones but he did not see what was inside the box. In his caution statement he had also stated that the person who had asked him to deliver the box was Magen and that he had obtained the box from Jimi. It was recorded, *inter alia*, in the caution statement as follows:

> S: Siapa yang menyuruh kamu dan dari mana kamu dapat kotak tersebut?
>
> J: Orang yang menyuruh saya adalah Magen dan saya dapat kotak itu dari Jimi yang letakkan didalam raga motor saya di depan Pizza Hut Taman Melati.

[12] We are of the view that if the caution statement had been adequately considered in the totality of the evidence at the close of the prosecution's case no reasonable person would have concluded that the appellant had actual knowledge of the drugs inside the box in the green bag, packed in plastic packets wrapped with Chinese newspaper in six packages.

[13] An appearance of being frightened and panicky or attempting to run away, upon being suddenly pounced upon by un-uniformed persons in a popular public food outlet, is no measure of guilt or knowledge of the drugs inside the box in the red bag under the custody and control of the appellant. Such conduct is equivocal. It must be considered in the totality of the evidence. The caution statement is brief but illuminating as to appellant's actual knowledge, if any, of the drugs found at the time of his arrest.

[14] He had given an explanation in the statement as to why he was frightened and why he struggled when the police suddenly pounced on him and hand-cuffed him. "Saya meronta kerana saya takut sebab saya bawa Handphone seludup"

[15] The material parts of the caution statement read as follows:

> S: Apakah yang anda hendak cakap kepada saya?
>
> J: Pada malam itu saya diupah untuk mengambil sekotak yang berisi Handphone tetapi saya tidak melihat apa yang ada didalam kotak itu. Saya disuruh menghantar kotak tu ke Restaurant Mc Donalds Setapak. Selepas itu saya naik ke

atas untuk berjumpa dengan orang yang nak terima kotak tersebut. Lepas tu orang yang saya kenali sebagai Magen dan dia meletakkan kotak tersebut disebelah tempat duduk dia saya duduk di hadapannya yang mana saya tak nampak isi kotak tu semasa Magen membukanya untuk periksanya. Jadi selepas itu dia buka kotak tu dan masuk ke dalam beg hijau askar. Lepas tu dia nak beredar dengan kotak tu dan selepas tu saya dengar jeritan Polis! Jangan bergerak, lalu dia campak kotak tu dihadapan saya dan terus lari dan polis terkam saya serta merta dan tolak saya kebawah dan gari saya dan saya cuba meronta tetapi saya digari. Saya meronta kerana saya takut sebab saya bawah Handphone seludup.

S: Siapa yang menyuruh kamu dan dari mana kamu dapat kotak tersebut?

J: Orang yang menyuruh saya adalah Magen dan saya dapat kotak tu dari Jimi yang letakkan didalam raga motor saya didepan Pizza Hut Melati.

[16] The prosecution invoked the presumption under s. 37(da)(iiia) of the Act to establish trafficking as the quantity of the drugs was 200.2 grams. The said section reads:

37 (da) any person who is found in possession of:

(i) …

(ii) …

(iii) ….

(iiia) a total of 15grammes or more in weight of heroin, morphine and monoacetylmorphines or a total of 15 grammes or more in weight of any two of the said drugs;

( ) …

(xxv) …

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved to be trafficking in the said drug;

[17] There was no evidence of any actual trafficking by the appellant. There was no transaction at all in the drugs by the accused at the restaurant. In the circumstances, in order to invoke the presumption of trafficking, the prosecution must establish actual possession of the said drugs.

A **[18]** We are unanimous the prosecution had failed to adduce sufficient evidence of actual possession of the drugs. There was no evidence he had actual knowledge of the drugs. Therefore, the presumption of trafficking under s. 37(da)(iiia) cannot be invoked. However, as there was *prima facie* evidence that the appellant had
B custody and control of the red bag and consequently of all the contents therein he shall be deemed to have been in possession of the drugs and shall be deemed to have known the nature of such drugs until the contrary is proved, upon invoking the aid of s. 37(d) of the Act.

C

[19] In the above circumstances, the appeal is allowed. The conviction and sentence for the offence of trafficking in dangerous drugs under s. 39B of the Act by the High Court is set aside and we substitute therefor a conviction for an offence under s. 12(2)
D of the Act, punishable under s. 39A(2)Act.

[20] The amount of the drugs is substantial. The appellant is sentenced to 17 years imprisonment from the date of arrest and ten strokes of the rotan.

E

F

G

H

I